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In the Supreme Court of the United States

OCTOBER TERM, 1993

SHARON PRATT KELLY, *et al.*,
Petitioners,

v.

LASHAWN A., BY HER NEXT FRIEND, EVELYN MOORE, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

I. Whether a federal court violates fundamental principles of federalism and comity when it regulates a local child-neglect and foster-care system based solely on local law enforceable by local family law courts.

II. Whether a federal court violates fundamental principles of federalism and comity when it decides constitutional claims arising out of child-custody matters at the behest of plaintiffs who are parties to proceedings in local family law courts where these claims may be raised.

PARTIES

This action was certified as a class action in the United States District Court for the District of Columbia. The lead plaintiff in that court, who is the lead respondent in this Court, is LaShawn A., by her next friend, Evelyn Moore. The petitioners in this Court are: Sharon Pratt Kelly, Mayor of the District of Columbia; Vincent C. Gray, Director, District of Columbia Department of Human Services ("DHS"); Clarice Dibble Walker, Commissioner of DHS's Commission on Social Services; Dr. Beverly Davis, Administrator of DHS's Family Services Administration; and Marilynn Riley, Chief of DHS's Child and Family Services Division. Petitioners appear in this Court in their official capacities as successors in interest to the original defendants, all of whom were sued in their official capacities: Marion Barry, Jr., Peter Parham, Barbara Burke-Tatum, Jean R. Hunter, and Evelyn Andrews.

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Sharon Pratt Kelly, Mayor of the District of Columbia, and Vincent C. Gray, Clarice Dibble Walker, Dr. Beverly Davis, and Marilynn Riley, officials of the District of Columbia, petition this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The April 16, 1993, decision of the United States Court of Appeals for the District of Columbia Circuit is reported at 990 F.2d 1319. App. 1a-14a. The April 18, 1991, decision of the United States District Court for the District of Columbia is reported at 762 F. Supp. 959. App. 15a-95a.

The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. Following its decision, petitioners filed a timely petition for rehearing and a suggestion for rehearing *en banc*. The petition and suggestion were denied on August 9, 1993. App. 95a-97a.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves provisions of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, 84 Stat. 473, codified in part in D.C. Code § 11-101 *et seq.* and § 11-1101 (1989 repl.); the Prevention of Child Abuse and Neglect Act of 1977 ("Abuse and Neglect Act"), D.C. Law 2-22 (1977), D.C. Code §§ 2-1351 to -1357, §§ 6-2101 to -2107, §§ 6-2121 to -2127, §§ 16-2301 to -2331, & §§ 16-2351 to -2365 (1988 & 1989 repl.); and the Youth Residential Facilities Licensure Act of 1986 ("Licensure Act"), D.C. Law 6-139 (1986), D.C. Code §§ 3-801 to -808 (1988 repl.).

The portions of these statutory provisions that are important to this petition are reproduced in a statutory appendix.

STATEMENT OF THE CASE

I. INTRODUCTION.

The protection and care of abused and neglected children have long been recognized as the special responsibilities of local government. To safeguard the interests of these children and of their parents, the States and the District of Columbia have enacted comprehensive legislation concerning child abuse and neglect, foster care, termination of parental rights, adoption, and related matters. These jurisdictions also have established specialized family courts to administer these laws. In recent years, moreover, as the problems of abused and neglected children and their families have multiplied and thereby stretched local resources, Congress has enacted legislation to assist the States and the District in addressing these problems.

This action was brought to secure federal court oversight of the District of Columbia's administration of its child-neglect and foster-care system. It was brought on behalf of District children reported to be neglected or abused, but not in the custody of the District, and on behalf of children in the District's child-neglect and foster-care system. Its principal aims were two-fold: (1) to secure services for families that would prevent the removal of abused and neglected children

from home or that would permit them to return home and (2) if a return home were not possible, to terminate parental rights expeditiously in order to increase the likelihood of adoption.

Plaintiffs sought relief principally under federal statutes and the Constitution. In the case of federal legislation, they claimed that the Child Abuse Prevention and Treatment Act[1] and the Adoption Assistance and Child Welfare Act of 1980,[2] confer rights on children that are enforceable pursuant to 42 U.S.C. § 1983. Plaintiffs also sought relief under District of Columbia law.

The United States District Court for the District of Columbia, the Honorable Thomas F. Hogan, ruled that the District's child-neglect and foster-care system violated federal legislation and the Constitution. Based on these rulings, the parties negotiated, and he approved, a far-reaching remedial order. In that order, the District reserved the right to challenge his liability rulings.

On appeal, the United States Court of Appeals for the District of Columbia Circuit held that Judge Hogan need not have abstained from reaching the constitutional issues in this case. At the same time, however, it refused to decide whether federal law provides a basis for a federal court to supervise the operation of the District's child-neglect and foster-care system. Instead, the court held that Judge Hogan could and should exercise supervision solely under local law. The court so ruled even though Congress has conferred exclusive jurisdiction of neglect and adoption matters on the District's local courts and even though the District of Columbia laws cited by the court have never been interpreted by the District of Columbia courts to provide the authority it posited.

The decision of the D.C. Circuit contravenes fundamental principles of federalism and comity. The court seriously erred

[1] 88 Stat. 4 (1974), 42 U.S.C. §§ 5101-5106, as added 102 Stat. 110 (1988), and renumbered 103 Stat. 764 (1989), 42 U.S.C. § 5106a.

[2] 94 Stat. 500, codified in Title IV-B of the Social Security Act, 42 U.S.C. §§ 620-627, and in Title IV-E, 42 U.S.C. §§ 670-679.

in holding that a federal court may, without any federal basis whatsoever, supervise the District's compliance with its laws governing the protection of abused and neglected children, including foster care, termination of parental rights, and adoption. The D.C. Circuit also seriously erred in ruling that a federal court may decide the constitutional claims of litigants who are parties to local family court proceedings even though these claims may be raised in those local court proceedings.

II. DISTRICT OF COLUMBIA LAW GOVERNING ABUSED OR NEGLECTED CHILDREN, FOSTER CARE, TERMINATION OF PARENTAL RIGHTS, AND ADOPTION.

The District of Columbia, like each of the States, has a comprehensive statutory framework governing the identification and protection of abused or neglected children, foster-care arrangements for such children, termination of parental rights, and adoption. The District, like each of the States, also has a specialized family-court system for administering these laws. The District's system became a purely local system in 1970 when Congress enacted the District of Columbia Court Reform and Criminal Procedure Act of 1970.[3] In the Court Reform Act, Congress created an independent local court system for the District of Columbia and conferred on the Family Division of the District of Columbia Superior Court "exclusive jurisdiction" of neglect and adoption proceedings. See D.C. Code § 11-1101(9) & (13) (1989 repl.).

One of the centerpieces of the District's framework for protecting children is its Abuse and Neglect Act of 1977. In simplified form, the Act provides that the District's Department of Human Services ("DHS") shall investigate within

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[3] Pub. L. 91-358, 84 Stat. 473, now codified in part in D.C. Code § 11-101 *et seq.* and § 11-1101 (1989 repl.). This Court previously has construed the Court Reform Act in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Key v. Doyle*, 434 U.S. 59 (1977); and *Palmore v. United States*, 411 U.S. 389 (1973).

24 hours reports of neglected children and that the Metropolitan Police Department shall "immediately" investigate reports of abused children. D.C. Code §§ 6-2102(b) & 6-2103(c). In these investigations, a preliminary determination is made whether a child should be removed from his home or whether the child "can be protected by the provision of services or resources." D.C. Code § 6-2105(a) & (b). A parent may also voluntarily place his child in the custody of the District on an emergency basis. D.C. Code § 6-2124(c)(1). A child may remain in this status for only 90 days unless his parent renews the emergency care agreement or unless DHS requests the District's Office of the Corporation Counsel to file a neglect petition in the Family Division of the Superior Court. D.C. Code § 6-2123(a)(2).

D.C. Code § 16-2301 *et seq.*, which governs judicial protection of children believed to be abused or neglected, is another centerpiece of the District's child-welfare system. The Family Division of the Superior Court oversees every important decision concerning such children — *e.g.*, whether they have, in fact, been abused or neglected and, if so, how they should be cared for. D.C. Code §§ 16-2312, 16-2313, 16-2317, 16-2320, 16-2322, 16-2323. The Family Division conducts evidentiary hearings on each of these matters after notice to all interested parties. D.C. Code §§ 16-2312, 16-2317, 16-2320. In these proceedings, a child is entitled to counsel, who is compensated by the District, as are his parent(s), if they cannot afford counsel. *Id. See also* D.C. Code § 16-2304.

The District has established several overriding principles to govern neglect proceedings, including preserving family life and ensuring child safety. For example, the rules of the Superior Court, which have been adopted by its Board of Judges with the approval of the District of Columbia Court of Appeals, provide:

> These rules are intended to provide for the just determination of *every* neglect proceeding. They shall be construed *to preserve family life to the maximum extent possible consistent with the child's right to*

> *safety, adequate parental care, permanence and continuity of relationships*. The rules further adopt the principle that when a child is removed from his or her own home, the Court shall endeavor to secure for the child custody, care and discipline as nearly as possible equivalent to that which should have been given by the parents . . ..

SCR-Neglect Rule 2 (emphasis added). In addition, District law provides that, if the Family Division finds that a child is neglected, it shall make a disposition "in the best interest of the child . . . except that no child shall be ordered placed outside his or her home unless the Division finds that the child cannot be protected in the home and there is an available placement likely to be less damaging to the child than the child's own home." D.C. Code § 16-2320(a).

The Family Division periodically reviews dispositional orders, either every six months or yearly depending on the age of the child and other circumstances. D.C. Code § 16-2323(a). At these hearings, the Family Division considers the extent to which a parent(s) has visited his or her child; whether and when a child may be returned home; and whether DHS intends to request the Office of the Corporation Counsel to file a motion to terminate parental rights and, if not, why not. D.C. Code § 16-2323(b).

The final centerpiece of the District's framework for protecting abused or neglected children is the law governing termination of parental rights and adoption, D.C. Code §§ 16-2351 to -2365. These provisions are intended to "encourage stability in the lives" of children by terminating the rights of parents who are no longer capable of caring for them, "*ensure that the constitutional rights of all parties are recognized and enforced*," and "increase opportunities for the prompt adoptive placement of children for whom parental rights have been terminated." D.C. Code § 16-2351(a)(1), (2) & (3) (emphasis added). To accomplish these goals, the law provides that the parties to a proceeding to terminate parental rights must include the child, his parent(s), and the agency having custody of the child. D.C. Code § 16-2356. In addi-

tion, in the case of a child who has been adjudicated abused or neglected and committed to the District's custody for more than 18 months and for whom no hearing on a motion to terminate parental rights has been held within the preceding 12 months, the law provides that the Family Division shall hold a review hearing to determine why a motion to terminate the parent-child relationship has not been filed; such hearings are thereafter held annually if necessary. D.C. Code § 16-2355(a) & (b).

Following a judicial determination that parental rights should be terminated, the District assumes legal custody of the child and attempts to place the child permanently. D.C. Code § 16-2360. If an adoptive placement is not made within six months of an order terminating parental rights, the Family Division monitors the District's efforts and has the power to issue orders to effectuate such a placement. D.C. Code § 16-2360(b).

III. PROCEDURAL HISTORY.

A. United States District Court.

This case was brought as a class action against the District of Columbia on behalf of two classes of children: (1) children about whom reports of neglect or abuse have been made and (2) abused or neglected children who enter the District's foster-care system. The complaint alleged federal statutory and constitutional claims and sought injunctive relief. The complaint also alleged pendent District-law claims.[4]

The District moved to dismiss on several grounds, including abstention and failure to state a claim, and it opposed certification of the action as a class action. Judge Hogan

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[4] The District was not named as a party. Instead, the defendants, all of whom were sued in their official capacities, were the Mayor and District child-welfare officials. See App. 16a n.2; App. 18a n.3; App. 72a n.25. Because the defendants were sued only in their official capacities, this action, as a practical and legal matter, was and is an action solely against the District. *See Kentucky v. Graham*, 473 U.S. 159, 165-68 (1985).

denied the motion to dismiss and certified the case as a class action.

Following a bench trial, Judge Hogan ruled, on April 18, 1991, that the District's operation of its child-neglect and foster-care system violated (1) the federal Abuse Prevention and Adoption Assistance Acts; (2) the substantive component of the Due Process Clause of the Fifth Amendment; and (3) the procedural component of the Due Process Clause. The procedural due process ruling was based on the theory that the District's Abuse and Neglect Act, its Licensure Act, and DHS's internal operating manual create liberty interests within the meaning of the Due Process Clause of the Fifth Amendment. App. 15a-94a.

1. Findings of Fact. Judge Hogan found that the District violated in two respects the federal statutory rights of children who are reported to be abused or neglected but who are not in the District's foster-care system. First, DHS failed to initiate prompt investigations of reports of neglect. App. 33a-36a. Second, DHS failed to provide services "to enable children to remain with their families or reunite with them if temporary placement is required" in violation of the "reasonable efforts" plan requirement of 42 U.S.C. § 671(15). App. 37a; see also App. 36a-37a. Such conduct, Judge Hogan also ruled, violates District law. App. 33a-37a.

In the case of children in foster care, Judge Hogan found violations of federal statutes, and District law and policy. For example, in the case of children voluntarily committed to the custody of DHS by their parent(s), DHS failed to return them home in a timely fashion. App. 38a. In addition, children were not placed in the "least restrictive" placement. App. 39a.

Judge Hogan also found that DHS was violating local law and agency policy by failing to " 'prepare a permanent plan' " for the placement of children who cannot be returned home within a reasonable time. App. 46a. More specifically, DHS was not expeditiously seeking to terminate parental rights or referring children who had been freed for adoption to its Adoption and Placement Resources Branch. App. 47a.

2. **Legal Rulings.** Judge Hogan ruled that 42 U.S.C. § 1983 is available to redress violations of both the federal Adoption Assistance Act and the Abuse Prevention Act. App. 73a-76a. In so ruling, he rejected the District's argument that "the federal statutes relied upon by plaintiffs merely establish state grant programs and do not create actionable rights . . .." App. 74a.

Despite his broad federal statutory rulings, Judge Hogan found it necessary to determine whether the District's failings also violated the Constitution. A constitutional ruling was necessary because, if the District decided to forego federal funding, "the Court would have *no basis* for enforcing any injunction it might order." App. 78a (emphasis added).

Judge Hogan then turned to the scope of plaintiffs' liberty interests and the scope of the District's constitutional duties. First, relying on *Youngberg v. Romeo*, 457 U.S. 307 (1982), and *Hutto v. Finney*, 437 U.S. 678 (1978), Judge Hogan ruled that "plaintiffs have a liberty interest in safe conditions" arising under the substantive component of the Due Process Clause (App. 82a) and more specifically "a right to reasonably safe placements in which they will not be harmed." App. 83a. "This right," moreover, "extends to safety from psychological and emotional harm." App. 83a, citing *Carey v. Piphus*, 435 U.S. 247 (1978). Relying on *Youngberg*, Judge Hogan also ruled that plaintiffs have a liberty interest in specific services:

> To the extent that certain services, such as appropriate placements and case planning, are essential to preventing harm to the children in the District's custody, this Court holds that the children have a constitutional liberty interest in those services.

App. 84a.

In addition, citing *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Taylor By and Through Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (*en banc*), *cert. denied*, 489 U.S. 1065 (1989), Judge Hogan ruled that the District's own statutes

and DHS's Manual of Operations create constitutionally protected interests because they provide specific standards for safeguarding children who are reported to be neglected or abused or who are in the District's foster-care system. App. 84a-86a.

Finally, Judge Hogan ruled that the District had violated plaintiffs' liberty interests in freedom from harm:

> The facts . . . establish beyond any doubt that defendants have failed to protect these plaintiffs from harm — whether physical, psychological, or emotional — by failing to place plaintiffs appropriately, failing to prepare case plans, failing to monitor placements, and failing to ensure permanent homes, among other things.

App. 90a.

The parties then negotiated an 84-page remedial order ("Final Order") conforming to Judge Hogan's sweeping federal liability rulings. In this order, the District expressly reserved the right to appeal the liability decision and the parties agreed that the Final Order and any implementation plan(s) would be null and void to the extent that Judge Hogan's liability rulings did not withstand appellate review. Judge Hogan entered a final judgment approving the Final Order on August 27, 1991. App. 98a.

B.–The Court of Appeals.

A three-judge panel of the United States Court of Appeals for the District of Columbia Circuit affirmed. It ruled that *Younger* abstention,[5] as explicated in *Moore v. Sims*, 442 U.S. 415 (1979), did not require Judge Hogan to abstain from deciding the constitutional claims of children who are parties to Family Division proceedings because, in its view, these claims are "multi-faceted" and thus broader than the claims within the purview of the Family Division. App. 4a-9a. The panel made this determination even as it acknowledged the three types of proceedings in the Family Division designed

[5] *Younger v Harris*, 401 U.S. 37 (1971).

to protect the interests of abused or neglected children: "(1) a 'neglect proceeding' adjudicating a neglect petition filed by the Corporation Counsel against the child's parents, (2) periodic review hearings, and (3) proceedings adjudicating motions to terminate parental rights." App. 6a. According to the panel, "[n]one of these proceedings is an appropriate forum for this multi-faceted class-action challenge to the District of Columbia's administration of its entire foster-care system." App. 6a. See also App. 8a ("In sum, there was no pending judicial proceeding in the District of Columbia which could have served as an adequate forum for the class of children in this case to present its multifaceted request for broad-based injunctive relief based on the Constitution and on federal and local statutory law.").

Despite ruling that abstention was not required, the panel refused to decide the merits of what it regarded as "the complex constitutional and federal statutory issues in this case," including the District's argument that *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), required reversal of Judge Hogan's ruling that the federal statutes relied on by plaintiffs were enforceable pursuant to 42 U.S.C. § 1983. App. 9a. It was unnecessary to reach these "complex" issues because, according to the panel, "[t]he District of Columbia's statutes and regulations provide a scheme for the protection and care of foster children, and children reported to be abused or neglected, that is equally as comprehensive as that provided by the federal statutes and is appropriately before us under our pendent jurisdiction." App. 9a.

Thus, the requirements of the District's local Abuse and Neglect Act, its Licensure Act, and DHS's Manual of Operations "parallel almost precisely the requirements contained in the relevant federal laws." App. 9a. Furthermore, "DHS has violated District law as well as federal law by failing, for example, to initiate timely investigations into reports of abuse or neglect, to provide services to families in order to prevent the placement of children in foster care, to place those who may not safely remain at home in appropriate foster homes and institutions, to develop case plans for

children in foster care, and to move children into a situation of permanency." App. 9a-10a. Finally, although unwilling to resolve the District's *Suter* challenge to Judge Hogan's federal statutory rulings, the panel seized the opportunity to rule — erroneously we believe — that the District's child-neglect and foster-care laws are enforceable by private rights of action. App. 10a-13a.

Insofar as the remedial order is concerned, the panel ordered Judge Hogan to reenter it, if possible, even though it had been negotiated by the parties on the basis of his sweeping federal liability rulings — rulings that the panel had declined to affirm. The only caveat the panel mentioned is that the decree may not be reentered to the extent Judge Hogan finds, on remand, that, under *Suter*, the decree improperly rests solely on federal statutory law. App. 13a-14a.

The District unsuccessfully sought rehearing and rehearing *en banc*. Two judges (Buckley & Williams, JJ.) would have granted the suggestion for rehearing *en banc* for the purpose of certifying to the District of Columbia Court of Appeals a threshold issue concerning the only basis of liability found by the panel — whether the District of Columbia laws identified by Judge Hogan are enforceable by a private right of action. Judge Ruth Bader Ginsburg did not participate. App. 97a.

REASONS FOR GRANTING THE WRIT

This case concerns fundamental questions of federalism and comity that are of great importance to the States and the District of Columbia and to their independent judiciaries. The D.C. Circuit has erroneously ruled that a federal court may decide custody-related constitutional claims of children who are parties to proceedings in local family law courts, even when these claims constitute the very *raison d'etre* of family law courts — whether children have been abused or neglected; whether they should be removed from their homes, and, if so, where they should be placed in foster care; whether the rights of their parents should be terminated; and adoption. Even worse, the D.C. Circuit has erroneously ruled that a

federal court may exercise jurisdiction over these children, and children reported to be abused or neglected, based solely on local child-welfare laws enforceable by the independent court systems of the States and the District of Columbia. The D.C. Circuit issued its local-law rulings, moreover, without even certifying to the highest court of the District of Columbia the critical issue whether District law creates private rights of action.

Each of these decisions flagrantly disregards the principles of federalism and comity underlying the diverse strands of this Court's abstention jurisprudence and conflicts with the fundamental premises of other federal appellate court decisions. The D.C. Circuit's no-abstention decision is in conflict with the principles of *Younger v. Harris*, 401 U.S. 37 (1971), as extended in *Moore v. Sims*, 442 U.S. 415 (1979). In *Moore*, this Court ruled that federal courts should abstain from deciding constitutional challenges to state child abuse and neglect systems when the plaintiffs in the federal action may raise these challenges in state judicial proceedings to which they are also parties. Under *Moore*, the D.C. Circuit erred in ruling that the district court need not have abstained from deciding the constitutional claims of children who are parties to proceedings in the Family Division of the Superior Court of the District of Columbia where these claims may be resolved.

The D.C. Circuit's pendent-jurisdiction decision conflicts with the principles set forth in *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), and *Ackenbrandt v. Richards*, 112 S. Ct. 2206 (1992). *Gibbs* and *Ackenbrandt* together preclude federal courts from entertaining pendent family-law claims. The D.C. Circuit, however, has ordered massive relief against the District, based solely on its interpretation of local law governing important family-law matters which have been entrusted by Congress to the District's local courts. The D.C. Circuit has done so, moreover, by erroneously interpreting settled local law and by resolving unsettled issues of local law.

The rulings for which review is sought constitute a serious intrusion into family-law matters that are properly the province of the courts of the District of Columbia. Congress has granted to the Family Division of the Superior Court exclusive jurisdiction of neglect and adoption matters and has authorized the District's local court system to decide the future of abused and neglected children in accordance with a comprehensive legal framework that expressly includes consideration of constitutional rights and that is otherwise sufficiently broad to encompass any such rights. Insofar as local family law is concerned, a federal court simply has no business construing such legislation in order to decide child-custody matters. A federal court, in contrast to a local family law court, has no expertise in child-custody matters and a federal court, in contrast to a local family law court, does not have before it the parents of children who, of course, have a constitutionally protected interest in their children.

As this Court ruled in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987), "[t]he various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases," but "[r]ather . . . reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." The D.C. Circuit's decision in this case has unnecessarily and wrongly exacerbated these tensions and, if allowed to stand, is likely to serve as a model for sweeping litigation in the federal courts in each of the 50 States.[6] The result would be unwise and contrary to the principles of federalism and comity that this Court repeatedly has upheld. Federal courts, with no authority to terminate parental rights or to approve adoptions, with no family law expertise, and without parents before them, should not be overseeing the operation of specialized local courts which have the legal authority to act with due regard to the interests of all affected persons.

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[6] Federal courts already have substantially intruded into this area. See National Center for Youth Law, "Foster Care Reform Litigation Docket" (1993) (collecting numerous federal court child-neglect and foster-care cases in 16 States).

I. THE RULING THAT A FEDERAL COURT IS FREE TO DECIDE CUSTODY-RELATED CONSTITUTIONAL CLAIMS OF CHILDREN WHO ARE PARTIES TO FAMILY DIVISION PROCEEDINGS IN WHICH THEY MAY RAISE THESE CLAIMS CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF OTHER FEDERAL APPELLATE COURTS.

A. This Court's Rulings.

This Court has ruled that federal courts should not decide constitutional claims at the behest of a federal plaintiff when that plaintiff is a party in a state judicial proceeding in which he has the opportunity to raise these claims. This Court has also ruled that lower federal courts do not have the power to review the decisions of the District of Columbia's independent judicial system. The decision of the D.C. Circuit that Judge Hogan did not err in deciding the constitutional claims of children who are parties to proceedings in the District's family law court violates both of these principles.

In *Younger v. Harris*, *supra*, this Court ruled that, in the absence of exceptional circumstances, not present here, a federal court may not enjoin, or otherwise interfere with, a pending state criminal prosecution. In *Moore v. Sims*, *supra*, this Court extended *Younger* to state child abuse and neglect proceedings and ruled that federal courts should abstain from deciding constitutional challenges to state child abuse and neglect systems when the federal plaintiffs have an opportunity to raise these challenges in state proceedings to which they also are parties.

In *Moore*, state officials removed children from their parents' custody without a hearing after concluding that their parents were abusing them; the officials thereafter successfully brought suit for emergency protection of these children in state court. The parents responded by filing in federal court a broad-based constitutional challenge to the state child abuse and neglect system and sought to enjoin state officials from pursuing the state court proceeding against them.

A three-judge federal court entered an injunction forbidding state officials "from filing or prosecuting any state suit under the challenged state statutes until a final determination" of constitutionality of the state's child-welfare scheme. It ruled that *Younger* abstention "was unwarranted because the litigation was '*multifaceted*,' involved custody of children, and was the product of procedural confusion in the state courts . . .." 442 U.S. at 422 (emphasis added).

This Court reversed. It explained:

> The *Younger* doctrine, which counsels federal-court abstention when there is a pending state proceeding, reflects a strong policy against federal intervention in state judicial processes in the absence of great and immediate irreparable injury to the federal plaintiff. . . . [T]he basic concern — that threat to our federal system posed by displacement of state courts by those of the National Government — is . . . fully applicable to civil proceedings in which important state interests are involved. . . . [T]he State here was a party to the state proceedings, and the temporary removal of a child in a child-abuse context is . . . "in aid of and closely related to criminal statutes."

Id. at 423 (citations omitted) (brackets added by this Court).

In *Moore*, this Court squarely rejected the ruling of the three-judge court that a federal court need not stay its hand if a plaintiff's constitutional claim is "multi-faceted." On the contrary, this Court ruled, "[t]he breadth of a challenge to a complex state statutory scheme has traditionally militated in *favor* of abstention, not *against* it." *Id.* at 427 (emphasis supplied by this Court). In addition, this Court reiterated that the exercise of

> equitable powers is inappropriate if there is an adequate remedy at law. . . . Restated in the abstention context, the federal court should not exert jurisdiction if the plaintiffs "had an *opportunity* to present their federal claims in the state proceedings." The pertinent issue is whether appellees' constitutional claims could have been raised in the pending state proceedings.

Id. at 425 (emphasis supplied by this Court) (citations omitted); *see also id.* at 430 ("the only pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims").[7]

This Court has not yet decided whether *Younger* abstention applies in the District of Columbia.[8] However, given the independent status of the District of Columbia courts and "Home Rule," this Court should rule that *Younger* does apply. Thus, as this Court ruled in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), the lower federal courts do not have the power to entertain constitutional challenges to District of Columbia judicial decisions. Instead, as a result of the Court Reform Act of 1970, this power may be exercised only by this Court:

> "[L]ower federal courts possess no power whatever to sit in direct review of state court decisions [including those of the District of Columbia courts]." . . . If the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial [of a claim] in a judicial proceeding . . ., then the District Court is in essence being called upon to review the state-court decision. This the District Court may not do.

Id. at 483-84 n.16.

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[7] In *Moore*, this Court also rejected the argument that every state decision to take custody of a child reported to be abused or neglected constitutes irreparable harm and thereby removes the *Younger* bar:

> . . . [T]he District Court again inverts traditional abstention logic when it states that because the interests involved are important, abstention is inappropriate. Family relations are a traditional area of state concern. . . . We are unwilling to conclude that state processes are unequal to the task of accommodating the various interests and deciding the constitutional questions that may arise in child-welfare litigation.

442 U.S. at 434-35.

[8] Nor has the D.C. Circuit. *See, e.g., District Properties Associates v. District of Columbia*, 743 F.2d 21, 28 n.4 (D.C. Cir. 1984); *Family Division Trial Lawyers v. Moultrie*, 725 F.2d 695, 701 n.7 (D.C. Cir. 1984).

B. Other Circuit Rulings.

As the D.C. Circuit itself has acknowledged, "a number of federal courts have declined to involve themselves in disputes over child custody even when federal constitutional questions were at stake." *Bennett v. Bennett*, 682 F.2d 1039, 1043 n.5 (D.C. Cir. 1982), citing *Bergstrom v. Bergstrom*, 623 F.2d 517 (8th Cir. 1980), and *Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978).

Bergstrom involved a child-custody dispute following a divorce; the mother had moved to Norway and the father had continued to reside in the United States. While the dispute was pending in a state family law court, the child brought an action in federal court urging that she had a constitutional right to remain in the United States. Although the Eighth Circuit declined to rule that *Younger* required abstention, it reached the same result — dismissal — by ruling that the constitutional issue was not ripe for review. It explained:

> Reexamination of custody arrangements is a matter which belongs exclusively in state court; domestic relations disputes have been traditionally subject to exclusive state jurisdiction. . . . Where a constitutional issue arises out of a custody dispute, and the initial determination involves a reexamination of the custody arrangement, the proper course is to dismiss the case and remand to the state court. . . .
>
> Since the time of the district court's injunction, this entire matter has been litigated in the North Dakota district court. An appeal from that decision is presently pending in the North Dakota Supreme Court. Unlike the record adduced in the federal district court hearing, the state court record was extensively developed and complete: both parents, as well as [the child] . . . appeared and were represented by counsel; the parties presented witnesses who testified and who were cross-examined; and the state court judge personally interviewed [the child] . . ..

623 F.2d at 520-21 (citations and footnotes omitted).

In *Huynh Thi Anh*, the Sixth Circuit ruled that a federal court should abstain from deciding whether a grandmother had a constitutional right to a familial relationship with her grandchildren who had been taken from Vietnam during "Operation Babylift" and for whom adoption petitions had been filed by the childrens' foster parents in a state family law court. In so ruling, the Sixth Circuit explained:

> Traditionally, disputes involving domestic relations including child custody and adoption proceedings, have been thought to be wholly within the province of the state courts. The cases recognize the "local" nature of domestic relations problems, the strong interest of the states in addressing such questions without interference, and the expertise of local agencies and courts in monitoring and resolving domestic relations matters. . . .
>
> The issues of whether the children may be adopted and whether the foster parents may have custody of the children are precisely the issues before the state court. While the case is not strictly the same as in *Younger* . . ., the reasons given by the Supreme Court for declining jurisdiction and deferring to the state court in that case are highly relevant here. Equitable principles favor adjudication of issues in one proceeding rather than in multiple proceedings for the sake of fairness and judicial efficiency. Here, as in *Younger*, the issues could all be resolved in the pending state proceeding. Second, strong considerations of comity lead federal courts to prevent friction with states and avoid interfering in state proceedings, particularly where the federal questions presented are closely intertwined with issues of strong local interest. . . .
>
> Our experience and sense of fairness teach us that this is not a case where the application of a federal *rule*, whether of constitutional or statutory origin, is likely to provide the best answer. We must rely on a judge in a court of family law — with its more flexible standards and with the parties before him and their latest circumstances in mind — to balance the equities and seek compromises that best accommodate the interests of the parties.

586 F.2d at 632-34 (emphasis supplied by court; citation and footnote omitted).

C. The Conflicts.

The D.C. Circuit's ruling that a federal court need not abstain from deciding the custody-related constitutional claims of children who are parties to District family law court proceedings conflicts with *Moore*, *Feldman*, and the decisions of the Sixth and Eighth Circuits. Because these children are parties to proceedings in the family law court of the District where these claims *may be* resolved, this is the forum in which these claims *should be* resolved. Furthermore, the D.C. Circuit's ruling wrongfully results in federal court oversight and interference with the independent judicial system of the District of Columbia. The Family Division resolves custody-related constitutional claims, whether or not denominated as such, and a federal court's intrusion into this area is likely to produce conflicting and less reliable decisions, given a federal court's lack of specialized knowledge and the fact that parents are not parties.

Here, the claims of children who are parties to Family Division proceedings, even if constitutionally based, relate to core Family Division issues. As even the D.C. Circuit and Judge Hogan described them, the primary claims are the failure of the District:

> to provide services to families to prevent the placement of children in foster care, the failure to place those who may not safely remain at home in appropriate foster homes and institutions, the failure to develop case plans for children in foster care, and the failure to move children into a situation of permanency, whether by returning them to their homes or freeing them for adoption.

App. 3a, quoting *LaShawn A.*, *supra*, 762 F. Supp. at 960 (App. 17a).

Such claims, however, are the *raison d'etre* of the Family Division of the Superior Court. The Family Division can, for

example, order services that would enable families to stay together or that would permit a child in the District's foster-care system to return home. In addition, only the Family Division has the authority to terminate parental rights and to permit adoption.

Moore would plainly bar a federal court from entertaining claims that (1) a parent has a constitutional right to services from the District that would prevent the removal of her child from home or permit her child's return or (2) her child, pursuant to a Family Division order, is in an unconstitutionally "inappropriate" foster home. Similar claims by children may also be, and therefore under *Moore* must also be, brought in the Family Division.

Furthermore, Judge Hogan's remedial order expressly and improperly interferes with Family Division proceedings. It provides, *inter alia*:

> Within sixty (60) days of the entry of this Order, the Mayor . . . shall arrange with the Family Division of the Superior Court *for the implementation of a process by which the Family Division shall conduct dispositional hearings as is required by federal law.*

Final Order 40 (emphasis added). Under *Moore* and similar rulings, a federal court is not permitted to supervise dispositional hearings conducted by Family Division judges.[9]

This is precisely what is happening and what will continue to happen unless the D.C. Circuit's decision is reversed. The decisions below have injected an improper federal presence into Family Division proceedings and even into the proceedings of the District's highest court. For example, in the

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[9] Even if this part of the decree (and others) were modified to substitute local law for federal law, this would only exacerbate the comity and federalism problems in this case. The decree would then require a federal court to monitor not only whether the executive branch of the District government is complying with local law, a function that should be reserved to the District of Columbia courts, but also whether the Family Division itself is complying with local law, a function that should be reserved to the District's highest court.

case of Demerick B., one of the named plaintiffs, Judge Hogan, on a limited record and without Demerick B.'s mother before him, characterized Demerick B. as a child "for whom it was recognized early on that return home would be impossible" and criticized the District for not referring him for adoption sooner than it did. App. 47a. By contrast, after Judge Hogan's decision, the District of Columbia Court of Appeals, in an appeal by his natural mother challenging the termination of her parental rights and his adoption, issued an order remanding for further proceedings. See *In re D.B.*, No. 91-357 (D.C. December 13, 1991). These very different approaches to the wisdom of terminating parental rights and adoption illustrate the vast potential for conflict between a federal court seeking to expedite the adoption process and the District of Columbia courts seeking to ensure that custody decisions are made only after the rights and interests of *all* affected persons are considered.

The foregoing also illustrates that, insofar as the principal interests advanced in this case are concerned — the interest in returning a child home and the often conflicting interest in terminating parental rights and placing a child in an adoptive home — the Family Division is a far better forum than a federal court for protecting all relevant interests effectively. The Family Division has the legal authority and the expertise necessary to decide these custody issues, as well as the responsibility and ability to bring *all* interested parties before it. By contrast, in the proceedings before Judge Hogan, the parents of the plaintiff children were neither parties nor participants even though parents have a constitutionally protected interest in maintaining the parental-child relationship. *See, e.g., Santosky v. Kramer*, 455 U.S. 745 (1982); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972). This is an interest that the courts below did not even consider, but which is an important factor, among many others, in the proceedings in the District of Columbia courts. *See e.g., In re A.W.*, 569 A.2d 168 (D.C. 1990) (upholding by a two-to-one vote decision terminating parental rights even though an adoptive parent had not yet been identified); *In re A.B.E.*, 564 A.2d 751 (D.C. 1989) (reversing decision terminating

parental rights); *In re S.G.*, 581 A.2d 771 (D.C. 1990) (upholding placement with maternal grandmother of child abused by her stepfather and rejecting claim of natural father that he was entitled to custody).[10]

Finally, a federal court's duty to abstain from deciding the constitutional claims of parties to state proceedings where these claims may be heard is not altered on the ground cited by the D.C. Circuit — that the constitutional claims are "multi-faceted." App. 6a, 8a. First, this Court in *Moore* squarely rejected the argument that abstention is not required in child-custody cases raising multi-faceted constitutional claims. Second, the D.C. Circuit's disposition of this case belies its assertion that the constitutional claims of those children who are parties to Family Division proceedings are broader than the matters cognizable by the Family Division. The D.C. Circuit removed from this case all constitutional claims, yet it remanded this case "to the district court, with instructions to fashion an equally comprehensive [remedial] order based entirely on District of Columbia law," subject only to reconsideration of the federal statutory claims in light of *Suter*. App. 13a-14a. The District law governing the principal claims of the children who are parties to Family Division proceedings is the law that is applied by the Family Division in determining whether a child should be removed from home or remain at home with services; where a child should be placed if he may not remain at home; whether parental rights should be terminated; and whether a child may be adopted and, if so, by whom.[11]

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[10] These cases illustrate the complex legal and factual matters that attend decisions concerning what course of action is in the best interests of an abused or neglected child and the difficulties of balancing those interests with the interests of parents. These cases also illustrate how enforcement of the Final Order has a real potential to interfere with the proceedings of the Family Division and the interests of the parties to those proceedings.

[11] In support of its ruling that the District of Columbia courts are not up to the task of deciding plaintiffs' constitutional claims, the D.C. Circuit relied principally upon *Family Division Trial Lawyers v. Moultrie*, 725 F.2d 695 (D.C. Cir. 1984), and *District Properties Associates v. District*

[Footnote continued on the next page]

In short, insofar as this suit concerns constitutionally based custody-related claims by children who are subject to the protection of the Family Division, it involves claims that are inextricably tied to issues within the Division's purview; seeks to interfere with the Division's proceedings; and is intended to affect the outcome of those proceedings. Abstention is therefore required.[12]

[Footnote continued from the previous page]
of Columbia, 743 F.2d 21 (D.C. Cir. 1984). The two cases are distinguishable. In *Trial Lawyers*, lawyers challenged the constitutionality of the Superior Court's former practice of appointing "counsel to represent indigent parents in neglect proceedings without reimbursement of any kind." 725 F.2d at 697. The lawyers bringing the federal suit, with a single exception the D.C. Circuit found not to be relevant, were not parties to proceedings in the Superior Court; and the attorneys' claims were "so ancillary to arguably related local court [neglect] proceedings that even the local court . . . [found them] disruptive of the resolution of core issues in those proceedings." *Id.* at 703. In *District Properties*, in turn, the D.C. Circuit ruled that *Younger* abstention was not appropriate because "*there are no ongoing proceedings in the local courts in which appellants could raise their federal constitutional claims.*" 743 F.2d at 28 (emphasis supplied by the court).

Here, by contrast, the constitutional claims of the children who are parties to Family Division proceedings lie at the very core of those proceedings.

[12] Two other matters should be noted. First, the D.C. Circuit also suggested (App. 8a) that abstention is not proper because plaintiffs may not bring a class action in the Family Division. This suggestion is wrong. The absence of a procedural device in the Family Division for aggregating individual claims in no way alters the fact that the individual claims may be litigated. Because children who are parties to Family Division proceedings may litigate in that forum the constitutional claims they raised here, their substantive rights are fully protected.

Second, insofar as the federal statutory claims are concerned, the District urged below that abstention was not necessary because *Suter* plainly precludes any private cause of action either by implication or under 42 U.S.C. § 1983. *See infra* at 26-27 n.15. The District also urged that, to the extent that these statutes permit a private cause of action, a federal court should abstain from entertaining any such action.

II. THE RULING THAT A FEDERAL COURT MAY EXERCISE PENDENT JURISDICTION OF LOCAL-LAW CLAIMS INVOLVING CHILD CUSTODY MATTERS CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF OTHER FEDERAL APPELLATE COURTS.

If, as we have explained, a federal court may not decide the constitutional claims of persons who are parties to state family court proceedings where they have an opportunity to raise these claims, it follows *a fortiori* that a federal court may not decide local family-law claims advanced by these persons. The decision of the D.C. Circuit to exercise pendent jurisdiction over such local-law claims is flawed for that reason, and, for the reasons that follow, that decision, as well as the decision to exercise pendent jurisdiction over claims of children who are not parties to Family Division proceedings, is also seriously flawed.

This Court long ago recognized that "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers of America v. Gibbs*, *supra*, 383 U.S. at 726. Thus, even though a federal court may have the power to decide pendent state-law claims in a case presenting a non-frivolous federal claim, a federal court may act improperly in exercising that power.[13]

One area in which this Court has ruled that a federal court may not enter is the area of state law governing child-custody decisions. In *Ackenbrandt v. Richards*, *supra*, this Court confirmed the existence of a domestic relations exception to the

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[13] In the past, the D.C. Circuit has recognized that the twin concepts of comity and federalism apply to federal court consideration of pendent District-law claims and thus that a federal court faced with pendent District-law claims, "must give due regard to whether a complaint poses novel and unsettled questions of state law." *Doe v. Board on Professional Responsibility*, 717 F.2d 1424, 1428 (D.C. Cir. 1983), citing *Gibbs*, *supra*, 383 U.S. at 726; *see also Financial General Bankshares, Inc. v. Metzger*, 680 F.2d 768 (D.C. Cir. 1982). In both of these cases, the D.C. Circuit ruled that the district court had abused its discretion in deciding pendent District-law claims.

diversity jurisdiction of the federal courts and set forth the "sound policy" reasons underlying this decision. These reasons apply with equal force here:

> Issuance of decrees of this type not infrequently involves retention of jurisdiction by the court and deployment of social workers to monitor compliance. As a matter of judicial economy, state courts are more eminently suited to work of this type than are federal courts, which lack the close association with state and local government organizations dedicated to handling issues that arise out of conflicts over . . . child custody decrees. Moreover, as a matter of judicial expertise, it makes far more sense to retain the rule that federal courts lack power to issue these types of decrees because of the special proficiency developed by state tribunals over the past century and a half in handling issues that arise in the granting of such decrees.

112 S. Ct. at 2215.

Here, the D.C. Circuit improperly plunged the federal judiciary into the thicket of District of Columbia family law. Acting as if Congress had never enacted the Court Reform Act and ignoring the clear warning signals in *Gibbs* and *Ackenbrandt*, the D.C. Circuit treated the alleged violations of District law as if they were merely lesser included offenses of the alleged violations of federal law.[14] According to the D.C. Circuit, it is proper for a federal court to decide local-law issues in order to avoid having to decide not only constitutional issues but also complex issues of federal statutory construction.[15]

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[14] Indeed, the panel here also ignored the D.C. Circuit's own warnings against federal involvement in child custody cases because inquiries into what actions are in a child's best interests are "within the peculiar province, experience, and competence of the state courts." *Bennett v. Bennett*, 682 F.2d 1039, 1043 (D.C. Cir. 1982).

[15] The proposition that a federal court should decide pendent state claims to avoid construing what it believes are complex federal statutes is a novel and startling principle of judicial decisionmaking. Equally novel and startling is the court's decision that Judge Hogan should construe, once again, the two federal statutes at issue in this case — the Adoption Assistance Act and the Child Abuse Prevention Act — even though his earlier misconstruction of these statutes was properly before the court. [Footnote continued on the next page]

In taking the local-law route, the D.C. Circuit made serious errors. It overlooked the Court Reform Act of 1970 in which Congress conferred exclusive jurisdiction of neglect and adoption cases on the local courts of the District of Columbia. Furthermore, its decision that local law gives plaintiffs the right to bring this action rests on a fundamental misunderstanding of District law and was made without certifying any question to the District of Columbia Court of Appeals. The D.C. Circuit based its decision in part on an isolated provision of a local statute that has never been construed by the District's highest court. Even worse, the D.C. Circuit also failed to read dispositive statutory language and misread the decision of the District's highest court in *Turner v. District of Columbia*, 532 A.2d 662 (D.C. 1987). The D.C. Circuit's pendent jurisdiction ruling thus not only fails to provide a basis for imposing liability but also vividly illustrates why any local-law issue here should be decided in a proper case in the courts of the District of Columbia.

More specifically, the D.C. Circuit's decision is wrong in several critical respects:

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Furthermore, the issues of federal statutory construction are not complex. *In Suter v. Artist M.*, 112 S. Ct. 1360, 1363 (1992), this Court held that "the Adoption Assistance and Child Welfare Act of 1980, . . . 42 U.S.C. §§ 620-628, 670-679a," "does not create an enforceable right on behalf" of children. *See also In re D.G.*, 583 A.2d 160 (D.C. 1990) (correctly anticipating *Suter*). In *Suter*, the Court ruled that the Adoption Assistance Act is merely a federal grant program to the states and does not confer on children in foster care any private cause of action or create a right or privilege within the meaning of 42 U.S.C. § 1983.

In the District's view, *Suter* forecloses any federal statutory cause of action either by children in the District's foster-care system or by children not in the District's foster-care system for whom there have been reports of neglect or abuse. Thus, *Suter* plainly forecloses any private right to enforce the Adoption Assistance Act. In addition, *Suter* requires reversal of the decision that the Abuse Prevention Act confers rights on children who are not in the District's foster-care system but who have been the subject of a report of neglect or abuse. The Abuse Prevention Act, like the Adoption Assistance Act, is merely a federal grant program to enable states to improve efforts to protect neglected and abused children.

1. It ignores the Court Reform Act in which Congress vested "exclusive jurisdiction" of neglect and adoption proceedings in the Family Division. See D.C. Code § 11-1101(9) & (13) (1989 repl.).

2. It misreads the Youth Residential Facilities Licensure Act of 1986 and wrongly concludes that this action may be based on that statute. The mandamus provision (D.C. Code § 3-808(d)(1)) cited by the court (App. 12a) is qualified by § 3-808(d)(2), as follows: "Any person bringing an action under paragraph (1) of this subsection shall give the named defendant(s) at least 5 days advance notice . . . before the action is filed in court." The record here does not indicate that notice was given before this action was filed, and, as the language of § 3-808(d)(2) and *Campbell v. District of Columbia*, 568 A.2d 1076 (D.C. 1990), make clear, the filing of a lawsuit does not constitute statutory notice. *See also Brown v. United States*, 742 F.2d 1498, 1508 (D.C. Cir. 1984) (*en banc*) (compliance with statutory notice provision is a condition precedent to accrual of rights against the District), *cert. denied*, 471 U.S. 1073 (1985).

3. It misreads the decision of the District's highest court in *Turner*. The District's Prevention of Child Abuse and Neglect Act of 1977, as construed in *Turner*, does not create by implication a private right of action. Any cause of action a person may have against the District for tortious injury arises from the common law. When such a common law action is brought and when it is determined that the action is based on the District's failure to deliver public services, the action is barred by the District's public duty doctrine unless there is a special relationship between the tort victim and the District.[16] In *Turner*, the District's highest court merely held that the Abuse and Neglect Act creates a special relationship between the District and a child reported to be abused and thus precludes the District from raising the

[16] *See, e.g., Wanzer v. District of Columbia*, 580 A.2d 127 (D.C. 1990) (ambulance services); *Platt v. District of Columbia*, 467 A.2d 149 (D.C. 1983) (fire inspection services); *Warren v. District of Columbia*, 444 A.2d 1 (D.C. 1981) (*en banc*) (police services).

public duty doctrine as a bar to a tort claim otherwise cognizable under the common law. Thus, *Turner* merely permits a child to hold the District responsible only when (1) the child suffers an injury cognizable under the common law, such as wrongful death, which may fairly be said to have been negligently caused by District employees and (2) the child has a special relationship with the District.

In short, in reaching out to decide this case on District-law grounds, the D.C. Circuit wrongfully ignored *Gibbs* and *Ackenbrandt*; overlooked Congress' grant of exclusive jurisdiction to the Family Division of child neglect and adoption matters; and erred in interpreting local law.

CONCLUSION

The District is acutely aware that its child-neglect and foster-care system must be improved to ensure the well-being of its most vulnerable children. However, a federal court may not create an auxiliary federal Family Division in the apparent belief that it can do a better job than the combined forces of the District of Columbia government in allocating scarce resources and in interpreting and enforcing local law. Before a federal court embarks on a journey into one of the central functions of a local government, it ought to have a federal reason for doing so; its journey should be limited to its federal concerns; and it should not intrude into areas in which local courts are exercising their authority, including their authority to decide constitutional claims.

This Court should therefore review the decision of the D.C. Circuit. This Court should rule that Judge Hogan's sweeping order regulating the District's child-neglect and foster-care system cannot be upheld solely on District-law grounds. This Court should also rule that the principles of *Younger* and its progeny extend to the District of Columbia courts and require children who are parties to local family-court proceedings to litigate in that forum their constitutionally based custody claims.[17]

[17] There is one other important consideration. One result of the D.C. Circuit's decision may be to require the financially pressed District to [Footnote continued on the next page]

Respectfully submitted,

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[Footnote continued from the previous page]
pay attorney's fees to plaintiffs' counsel for this entire litigation even though plaintiffs have prevailed (mistakenly) only on local-law grounds. This potential fee award, and future potential fee awards for monitoring the remedial decree, are also compelling reasons for this Court to review the decision below.

Furthermore, as we have explained, Judge Hogan's pre-*Suter* federal statutory rulings do not survive *Suter*. *See supra* at 26-27 n.15. Finally, despite the flaws in the District's child-welfare system set forth in Judge Hogan's opinion, that opinion does not set forth findings of fact or evidence that approximate the allegations that have persuaded other federal courts to find a potential due process violation. *See, e.g., Yvonne L. ex rel. Lewis v. New Mexico Dep't of Human Services*, 959 F.2d 883, 893 (10th Cir. 1992) (foster-care child who was allegedly raped in foster-care facility has constitutional cause of action if she can establish that officials placed her in facility either knowing or suspecting that it was dangerous); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990) (Posner, J.) (placement of child with foster parent known to be, or suspected of being, a child abuser violates due process, but seemingly mindless shuttle of child from one foster home to another does not). *Compare Child v. Beame*, 412 F. Supp. 593 (S.D.N.Y. 1976) (Weinfeld, J.) (dismissing complaint alleging that state violated Constitution by deliberately pursuing policy of keeping children in foster care rather than seeking out adoptive homes).